NO. 84-495

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LeROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

V.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees

On Appeal from the United States
Court of Appeals for the Third Circuit

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

ARGUMENT

1. Appellees argue (Br. 7-10), relying on South Carolina Electric and Gas Co. v. Flemming, 351 U.S. 901 (1956) (per curiam) and Slaker v. O'Connor, 278 U.S. 188 (1929), that the Court lacks

jurisdiction over this appeal under 28 U.S.C. § 1254(2) because there is no final judgment. The Court more recently had occasion to observe that

> [t]here may be some question as to the continuing vitality of the "finality" requirement in the context of [28 U.S.C.] §1254(2), which unlike such jurisdictional statutes as 28 U.S.C. §§1257 and 1291 has no "finality" provision in the statute itself.

New Orleans v. Dukes, 427 U.S. 297, 301-302 (1976) (per curiam). On other occasions, the Court has adverted to the question without resolving it. See Doran v. Salem Inn, Inc., 422 U.S. 922, 927 (1975); Chicago v. Atchison T & S.F.R. Co., 357 U.S. 77, 82-83 (1958).

Appellants respectfully submit that Slaker v. O'Connor, supra and South Carolina Electric and Gas Co. v. Flemming, supra, mistakenly read into 28 U.S.C. §1254(2) a requirement of finality. Only in Slaker did the Court

discuss the finality issue. But the issue was not before the Court; as the Court observed: "The petition contained three counts none of which questioned the validity of the statute." 278 U.S., at 189. The attempt to appeal under the predecessor of Section 1254(2) was, as the Court held, patently frivolous. Moreover, in neither Slaker nor Flemming did the Court have the benefit of briefs and arguments of counsel on the finality question.

Section 240(b) of the Judiciary Act of 1925, the predecessor of §1254(2) made no mention of a requirement of finality. 43 Stat. 936, 939. This provision was inserted into the bill which became the Judiciary Act during the Senate debate as a parallel to the section permitting an appeal from state court judgments holding unconstitutional federal statutes or treaties. See

Frankfurter and Landis, The Business of the Supreme Court, 276-278 (1927). That later provision contained specific language requiring a final judgment. 43 Stat. 936, 937. Congress plainly was aware of the final judgment requirement and, it must be assumed, purposely omitted it from §240(b). In the 1948 recodification of the Judicial Code the final judgment qualification was retained for appeals from state courts, 28 U.S.C. §1257, but no such requirement was attached to appeals under §1254(2).

Good reasons support the Congressional decision not to impose a requirement of finality in appeals from circuit court decisions holding state statutes unconstitutional. The concept of federalism, which embodies the subsidiary principle of federal court respect for state sovereignty, supports the view that Supreme Court intervention

should be required at the earliest stage consistent with sound, efficient judicial administration. Every day in which a state statute is enjoined from enforcement by federal court order, perhaps erroneously, weakens the state-federal balance of responsibility.

The need for a right to appeal can be exemplified no better then by this case. Here a court of appeals has taken the patently erroneous course of declaring numerous provisions of state law unconstitutional despite the fact that no trial has been held, the defendants have yet to offer evidence to support the statutes and the proceedings which were held in the district court were abbreviated and expedited. See Jurisdictional Statement, pp. 6-7. It is plain that, in providing an appeal to this Court as a matter right in cases in which a court of appeals has held a

state statute unconstitutional, Congress intended to facilitate this Court's review. A requirement of finality directly contradicts this overriding purpose of the statute and this is precisely why, by its terms, §1254(2) contains no requirement of finality.

If no appeal lies at this time, the court of appeals will have effectively limited the State's ability to obtain review by this Court of an injunction which may be in force for years before it will be ripe for appellate review. To be sure, certiorari is available, as appellees concede, but as we have discussed, Congressional preference for an appeal as of right has strong support in the concept of federalism. This illustrates quite clearly the basis for Congress' choice not to impose a finality requirement for appellate jurisdiction under §1254(2).

The only countervailing policy supporting a finality qualification for §1254(2) appeals is the necessity of conserving this Court's resources by avoiding piecemeal litigation. That policy would not be undercut by appellate review in cases such as this one. The court of appeals unequivocally has ruled that the statutory provisions at issue here are unconstitutional. There is no realistic possibility that further factual development will alter that court's views. Of greater importance is the substantial risk that defendants will be precluded from offering evidence at trial in support of the constitutionality of the provisions struck down by the court of appeals. Eventual reversal by this Court with directions that a new trial be held disserves the interest in judicial economy.

For these reasons, §1254(2) should be interpreted to permit an appeal in this case.

2. Even if the Court concludes that it lacks jurisdiction over this appeal, certiorari should be granted and the Third Circuit's decision should be reversed. As we detailed at length in our jurisdictional statement (pp. 10-14), the Court of Appeals seriously "departed from the accepted and usual course of judicial proceedings . . . ." Sup. Ct. R. 17.1(a). In fact, appellees make no serious attempt to distinguish this case from Mayo v. Lakland Highlands Canning Co., 309 U.S. 310 (1940), in which the Court held as clearly as it could that statutes should not be held unconstitutional when the sole question before the court is whether a preliminary injunction should be granted.

Appellees argue (Motion to Dismiss or Affirm, p. 12) that the course followed by the Court of Appeals was appropriate because no factual record could be developed to support the striken provisions and they are "unconstitutional as a matter of law." Suffice it to say that Mayo holds that no court is warranted in making this assumption. In fact, only if the parties expressly agree may a preliminary injunction proceeding be regarded as a proceeding on the merits. Fed. R.Civ. P. 65(a)(2). This Court recently noted that an order consolidating a trial on the merits with a preliminary injunction hearing should be preceded by

> "clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present for their respective cases."

University of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (alteration in original; citations omitted). Of course, no such notice was provided here since the district and the parties all clearly understood that no ruling on the merits would be issued. App. 176c, n.1; 274a-278a.

The Court of Appeals' departure from accepted judicial procedure warrants this Court's review. Moreover, for the reasons outlined at length in our jurisdictional statement, the Third Circuit clearly failed to properly apply this Court's precedents to the particular statutory provisions at issue here; this presents additional grounds warranting this Court's immediate review.

CONCLUSION

Probably jurisdiction should be noted. In the alternative, certiora should be granted.

Respectfully submitted,

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